Supreme Court, U. S.
FILED
NOV 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-718
IN THE

Supreme Court of the United States

October Term, 1980

JAMES O. HEWITT, *et al.*, and RINCON DEL DIABLO MUNICIPAL WATER DISTRICT,

Petitioners,

vs.

THE CITY OF ESCONDIDO,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One.

RESPONDENT'S BRIEF IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

Respondent, the City of Escondido, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision in this case by the California Court of Appeal, Fourth Appellate District, Division 1.

Opinion Below.

The opinion of the California Court of Appeal is reported at 107 Cal.App.3d 78, 165 Cal.Rptr. 545, and a printed copy is attached to the petition as Appendix A.[1]

[1]As used herein, "Pet." refers to the Petition for a Writ of Certorari; "Opinion" refers to the decision of the Court of Appeal with page references being the pages of Appendix A to the petition; "Appendix" refers to an appendix to the petition.

Statement of the Case.

In 1972, two contiguous California public agencies—a city and a water district—entered into a contract which provided for the integration and operation of their overlapping water systems. The agreement, which ended litigation between the two agencies, was the product of extensive negotiations. Those in charge of making decisions—the elected officials of each—determined that it was in the interest of their respective water users to create a single, unified water system which would meet the needs of all the residents of the valley that the two agencies occupied, and which would eliminate the recurrent controversies that had engaged the parties over the years as the area urbanized and the city inexorably expanded into the territory of the water district.

The sole question presented to the courts below was the validity of the resulting Operational Merger Agreement, a copy of which is attached to the petition as Appendix B. In a unanimous opinion, the California Court of Appeal found that the agreement was authorized by express statutes of the State Legislature and that it complied with standards established by California law as well as the United States Constitution. The California Supreme Court declined to grant a petition to hear the matter, and the decision of the Court of Appeal is now final.

The interpretation and application of numerous state statutes, constitutional provisions and legal principles were involved in reaching the final decision below. One of the many claims asserted by petitioners is the one now being presented to this Court, namely, that the voting power and influence of the voters within the water district somehow had been "unconstitutionally diluted" by the agreement. (Pet. 7.)

Petitioners base their argument on the claim that the water district relinquished "virtually all policy-making, discretionary power" to the city. (Pet. 6.) This characterization of the agreement is incorrect and misleading, since the agreement involved only the *operations* of the two water systems of the parties, which were to be integrated and managed as a single system. It did not deal with or affect other powers and functions of the district. Petitioners description of the district as "virtually powerless to control its own destiny" (Pet. 6) was found by the Court of Appeal to be an inaccurate interpretation of the agreement. The Court of Appeal correctly determined that:

> "Full operational merger will not reduce Rincon [district] to an 'empty shell' nor result in a complete abdication of all its legislative power, as contended by [petitioner] Hewitt. Rincon will still continue to exist as a legal entity with a variety of powers and responsibilities. It still has power to acquire, construct and operate facilities for treatment and disposal of sewage, waste and storm water (Water Code, § 71660). Its board of directors shall still determine the amounts necessary to be raised by taxation during the fiscal year and shall fix tax rates to be levied (Water Code, § 72093). Although the rates for water service will in effect be set by City, the board of directors has predetermined by the merger agreement those rates will be at cost and will not exceed the rates charged any other water user in the entire Escondido Valley area. Rincon will retain its membership with the San Diego Water Authority in order to help protect the water supply to Escondido Valley and assist in any possible manner in the implementation of the merger agreement (see *ante*, § 26 [of the agreement]).
>
> "Rincon also retains the power and ability to monitor and enforce the merger agreement to make certain City

lives up to its assumed responsibilities, and if a substantial breach of contract occurs, Rincon has appropriate remedies in court." (Opinion, A-8.)

REASONS FOR DENYING THE WRIT.

I.

The Voting Power of the Voters of the District Was Unaffected.

All powers, privileges and duties of the water district are exercised and performed by a board of directors (Cal. Water Code, § 71300), the members of which are elected by the qualified voters of the district. (Cal. Water Code, §§ 71500-05.) These voting rights of the electorate of the district are untouched by the agreement. The district continues in existence, continues to own property, continues to have and exercise significant powers, and continues to have an elected board of directors to conduct its affairs. The voting rights of the people continue as before.

The only thing that has happened is that the board of directors of the district has transferred to the city, pursuant to a negotiated agreement, contractual rights to operate the district's water system in accordance with specified standards, while retaining to itself reciprocal contractual rights to monitor and enforce the agreement. Such an agreement is recognized under California law as beneficial and necessary. As the Court of Appeal declared:

> "The merger agreement is a contract of cooperation by two public agencies who have joined together to form one integrated water system, with each party contributing certain physical assets or property and agreeing to perform certain activities to integrate their respective water systems. Upon full integration or, as the agreement states, 'after full operational merger,' the combined systems will be operated exclusively by one agency for the benefit of both parties. This is exactly what was intended by Legislature when it enacted sections 71722 and 71723 [of the California Water Code]." (Opinion, A-10.)

No constitutional infirmity regarding the right to vote has been or can be raised, since voting rights remain unaffected by the agreement.

II.

The Equal Protection Clause Is Not Violated by the Operational Merger Agreement.

Recognizing that the right to vote has not been *directly* affected, petitioners argue that the "force and effect of the vote" has been "eroded and diluted" (Pet. 6) and that the voters "influence on the decision-making process" also has been diluted (Pet. 7). Petitioners cite no decisions from this or any other court for their claim that this constitutes a denial of equal protection of the laws. The most that they can point to is a passing observation, regarding a union taking over the functions of a school board, by Justice Powell in a footnote to a concurring opinion in *Abood v. Detroit Board of Education*, 431 U. S. 209, 261, n. 15, 52 L. Ed. 2d 261, 301, 97 S. Ct. 1782 (1977), a case involving the propriety of an "agency shop" arrangement for local government employees in Michigan. The comment, even if accepted by this Court, is inapposite to the present case, since the operational agreement does not involve delegation of the unlimited range of power that concerned Justice Powell. On the contrary, the agreement deals only with the water operations of the district, narrowly circumscribing the power of the city by delineating and specifying its responsibilities.

More directly in point is the 1978 decision of this Court in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 58 L. Ed. 2d 292, 99 S. Ct. 383 (1978), in which the constitutional propriety of a state statute vesting in a city extensive police powers over adjacent rural areas was in question. This Court held that neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment had

been violated. The case involved powers and functions far more pervasive than the mere providing of water service. We submit that Justice Stevens, in his concurring opinion in *Holt Civic Club,* accurately stated the law applicable to the present case when he declared:

> "Certainly there is nothing in the Federal Constitution to prevent a suburb from contracting with the nearby city to provide municipal services for its residents, even though those residents have no voice in the election of the city's officials or in the formulation of the city's rules." (439 U.S. at 76.)

The city and the water district have not gone as far as Justice Stevens indicated was permissible. Standards were incorporated in the Operational Merger Agreement, which required the providing of "good water service" as defined in the agreement (Pet., Appendix B, § 5(a)), mandated a uniform system of water rates for the entire area (Pet., Appendix B, § 21), and prohibited the city from using water revenues to finance any other city functions (Pet., Appendix B, § 21). Moreover, title to the district's water system continued to be vested in the district, including any future additions, betterments and extensions, subject only to the operation of the system by the city under the terms of the agreement. (Pet., Appendix B, § 25.)

The agreement was and is an innovative attempt to physically unify interwoven water systems and to foreclose future political and legal controversies, with the voters and water users being the ultimate beneficiaries. This was accomplished not by legislative fiat, but by a cooperative understanding following give-and-take by the elected representatives of each side. Such agreements have long been sanctioned and encouraged by California law (Cal. Water Code, §§ 71722-23; Cal. Government Code, § 6502; *City of Oakland v. Williams* 15 Cal.2d 542, 549, 103 P.2d 168

(1940)), as well as by other jurisdictions (56 Am. Jur.2d, *Municipal Corporations*, § 217; 123 A.L.R. 997 (1939)). It is respectfully urged that this Court should not jeopardize the existence of a myriad of joint governmental ventures throughout the nation by a decision which would create and then give constitutional status to a right not to have the "vote" or "influence" of a voter "diluted" by a contract entered into by his elected representatives affecting some functions of the elected body. As this Court said in *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105, 110-111, 18 L. Ed. 2d 650, 87 S. Ct. 1549 (1967):

> "Viable local governments may need many innovations numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

Petitioners' thesis would be a unique extension of the concept of equal protection. If it is adopted, two public agencies would be forever barred from entering into any kind of cooperative agreement with each other, since in every such instance the powers of one governing board must necessarily be reduced. In any contract, each party gives up some discretion and some independence by binding itself to the terms of the contract. This is an inherent characteristic of any contract, whether between public or private parties.

There is no question but that this Court has been properly vigilant and zealous in its concern for the voter and in guaranteeing his or her right to utilize the ballot box and be heard. But it would be straining of constitutional principles to infer a denial of equal protection of the laws from a contract which merely involves the operation of a local water system. Petitioners grossly overstate their argument in trying to equate this case with this Court's monumental

decision in *Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964), which dealt with the malapportionment of state legislative bodies and the invidious and discriminatory effects of such apportionment upon the voter. Justice Holmes' observation in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 52 L. Ed. 828, 28 S. Ct. 529 (1908), which was quoted with approval in *Holt Civic Club v. City of Tuscaloosa, supra*, 439 U.S. at 70, 58 L. Ed. 2d 292, 99 S. Ct. 383, is particularly appropriate here:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

The extension of the boundaries of equal protection of the laws into the realm of governmental contracts would be disruptive of such relationships, while producing, at best, speculative benefits for the electorate of those contracting parties. This is particularly true under the facts of this case involving a single agreement affecting only the operations of a utility service without interfering in any way with either the remaining powers of the elected officials or with the right of the people to vote.

As the Court of Appeal said:

> "The merger agreement does not substitute the city council of Escondido for the board of directors of Rincon [district], as analogized by [petitioner] Hewitt. The Rincon board of directors with its remaining duties and powers is unaffected by the agreement which deals only with the maintenance and operation of the water system. Rincon's board of directors will continue to

exist and function by exercising all of its powers except the day-to-day operation of the water system." (Opinion, A-14)

Conclusion.

No meritorious issues have been raised by petitioners, who seek to extend constitutional safeguards far beyond the limits heretofore deemed necessary by this Court. There are no conflicting decisions, state or federal, that need reconciliation by this Court. We submit that the California court correctly determined that there was "no disenfranchisement of the voters of Rincon and no denial of equal protection of the law." (Opinion, A-13.) The application for a writ of certiorari, therefore, should be denied.

Dated: November 28, 1980.

Respectfully submitted,

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